Supreme Court, U.S.
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NO. 88-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MOLINA,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is City of Houston Ordinance No. 85-1337 (the "Ordinance") a constitutionally permissible time, place or manner regulation of the interior configuration and lighting of adult arcades?

2. Is the Ordinance unconstitutionally vague or unconstitutionally overbroad on its face or as applied?

3. Is the Ordinance a content-neutral regulation addressing the secondary effects of adult arcades that does not violate due process of law and does not constitute a prior restraint on freedom of speech?

LIST OF INTERESTED PARTIES

1. *Petitioner:* Anthony Molina
2. *Respondent:* the State of Texas

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review by this Court of the unpublished opinion of the Fourteenth Court of Appeals of Texas, and the order of the Court of Criminal Appeals of Texas refusing review of that decision.

STATEMENT OF THE CASE

This case involves the constitutionality of a local ordinance that regulates adult arcades, which are defined in terms of premises where entertainment depicting cer-

tain specified sexual activities is dispensed by means of electronic or mechanical arcade devices. The Ordinance requires an unobstructed view from a manager's station of any area of the adult arcade to which patrons have access, and requires a minimum level of lighting for the premises. The Ordinance makes it unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless a permit has been obtained for that adult arcade. Petitioner was adjudged guilty of violating the permit requirement.

The unpublished opinion of the Fourteenth Court of Appeals[1] filed October 27, 1988 (Appendix "C" to the Petition for Writ of Certiorari), correctly states the facts in this case. There is no extended discussion of the facts or law of this case in the unpublished opinion, since the Fourteenth Court of Appeals found the case to be identical to previous cases upholding the Ordinance, which were decided by both the Fourteenth Court of Appeals of Texas and the First Court of Appeals of Texas in published opinions, to-wit: *Martinez v. State,* 744 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*); *Oniyide v. State,* 756 S.W.2d 370 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*); *Lopez v. State,* 756 S.W.2d 49 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*); and *Rahmani v. State,* 748 S.W.2d 618 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*).[2]

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1. The copy of the Petition for Writ of Certiorari served on Respondent incorrectly indicates that a writ should be directed to the Court of Appeals for the First Supreme Judicial District of Texas. The decision complained of was actually rendered by the Fourteenth Court of Appeals of Texas. *See,* Appendix "C" to the Petition.

2. The decision in *Rahmani v. State, supra,* is the subject of a similar petition for writ of certiorari to the First Court of Appeals of Texas filed with this Court and served on Respondent on the same date as this Petition was served, March 30, 1989.

REASONS THE PETITION SHOULD BE DENIED

The Ordinance is a constitutionally valid time, place or manner regulation of the secondary effects of adult arcades.

The purpose of the Houston Ordinance regulating the configuration and lighting of adult arcades is to deter sexually related criminal activities occurring in the small, enclosed booths typically found in adult arcades, to protect the health of patrons and employees from sexually transmitted diseases, and to improve egress in the event of fire. *Gordon v. State,* 757 S.W.2d 496 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*); *Lopez v. State,* 756 S.W.2d 49, 51-52 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*). The governmental interests of health and safety that the Houston Ordinance seeks to advance are significant and substantial, *Gordon v. State, supra;* and are unrelated to the suppression of speech. *Martinez v. State,* 744 S.W.2d 224, 228 (Tex. App.—Houston [1st Dist.] 1987, *pet. ref'd*).

In addition to the decisions of the Texas courts of appeals upholding the Ordinance, *supra,* the overwhelming majority of state and federal courts that have reviewed similar ordinances requiring that viewing booths in adult entertainment establishments be open to observation have upheld such regulations against first amendment and other constitutional attacks.[3]

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3. *See,* e.g., *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982); *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165 (4th Cir. 1986); *Berg v. Health and Hospital Corporation of Marion County, Indiana,* 865 F.2d 797 (7th Cir. 1988); *Broadway Books, Inc. v. Roberts,* 642 F. Supp. 486 (E.D. Tenn. 1986); *Suburban Video, Inc. v. City of Delafield,* 694 F. Supp. 585 (E.D. Wis. 1988); *Postscript Enterprises v. City of Bridgeton,* 699 F. Supp. 1393 (E.D. Mo. 1988); *Doe v. City of Minneapolis,*

The Fifth Circuit Court of Appeals, in a case currently before this Court, has upheld a prohibition on enclosed booths enacted by the City of Dallas, Texas, that is similar to the Houston Ordinance, in accordance with what the Court termed "the prevailing view" that such regulations do not offend the First Amendment. *FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298, 1304 (5th Cir. 1988), *certiorari granted,* ____U.S.____, 109 S. Ct. 1309 (1989). In accord with this "prevailing view" that ordinances attempting to deter sexual activity by requiring open viewing booths are valid time, place or manner restrictions that do not violate the first amendment, are decisions from the Fourth, Ninth and Seventh United States Courts of Appeals. *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982); and *Berg v. Health and Hospital Corporation of Marion County, Indiana,* 865 F.2d 797 (7th Cir. 1988). There is no conflict among the circuits that would support the granting of this Petition, but rather general agreement in the reported cases that "open booth" regulations are valid time, place or manner restrictions that do not offend the first amendment.

A. The Ordinance is not unconstitutionally vague.

Contrary to Petitioner's assertions, the terms of the Ordinance are sufficiently definite so that "ordinary people can understand what conduct is prohibited,"

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693 F. Supp. 774 (D. Minn. 1988); *Deluxe Theater & Bookstore, Inc. v. City of San Diego,* 221 Cal. Rptr. 100 (Cal. App. 1985); *Antonello v. City of San Diego,* 93 Cal. Rptr. 820 (1971), *cert. denied,* 404 U.S. 912 (1971); *EWAP, Inc. v. City of Los Angeles,* 158 Cal. Rptr. 579 (Cal. App. 1979); *People v. B&I News, Inc.,* 211 Cal. Rptr. 346 (Cal. App. Dep't Super. Ct. 1984).

and are expressed "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983) (citations omitted). Moreover, "mathematical certainty" in the language of an ordinance is not required. *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972).

The Ordinance contains, *inter alia,* the following definitions, in Section 28-81:

> *Adult arcade* shall mean any 'premises' to which members of the public or members of any club, group or association are admitted and permitted to use one or more 'arcade devices.'
>
> *Arcade device* shall mean any coin or slug operated or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of 'entertainment', that is intended for the viewing of five or fewer persons in exchange for any payment of any consideration.
>
> *Entertainment* shall mean (1) any live exhibition, display or performance, or (2) any still picture(s) or movie picture(s), whether mechanically, electrically or electronically displayed, or (3) any combination of the foregoing, in which the 'specified sexual activities' are depicted.
>
> * * * *
>
> *Operator* shall mean the 'individual' who is principally in charge of the management of the 'adult arcade.'
>
> *Owner or Owners* shall mean the proprietor if a sole proprietorship, all partners (general and limited) if a partnership or all officers, directors and persons holding ten percent (10%) or more of the outstanding shares if a corporation. Provided, however,

> the term 'owner' or 'owners' shall not include any of the aforesaid persons who has given to the 'operator' a statement under oath that the person does not desire to be listed on a permit application under this article and that the person waives any right to any notice that is required or permitted to be given by the City or any officer or agency thereof in connection with the application or permit for the adult arcade under this article.
>
> * * * *
>
> *Premises* shall mean a building, provided that if a building has been physically divided into separate units that each have their own individual means of ingress or egress to the exterior of the building and which are offered by lease or otherwise for separate use and control, then it shall refer to each such separate unit.
>
> *Specified sexual activities* shall mean (1) human genitals in a state of sexual stimulation or arousal, (2) acts of human masturbation, sexual intercourse or sodomy, (3) fondling or other erotic touching of human genitals, pubic regions, buttock or female breast, or (4) any combination thereof.

The offense with which Petitioner was charged is stated in Section 28-91(a) of the Ordinance, which reads as follows:

> Sec. 28-91.
>
> (a) It shall be unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless there is a permit for the adult arcade.

In order to obtain a permit an adult arcade must comply with the design and lighting requirements enumerated in the ordinance:

Sec. 28-101. *View from manager's station.*

(a) If an adult arcade has one manager's station designated pursuant to section 28-93(c) of this Code, then the interior of the adult arcade shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade to which any patron is permitted access for any purpose from that manager's station. If an adult arcade has two or more manager's stations designated pursuant to section 28-93(c) then the interior of the adult arcade shall be configured in such a manner that there is an unobstructed view of each area of the adult arcade to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(b) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in an adult arcade to ensure that the view area specified in subsection (a) remains unobstructed by any merchandise, display racks or other materials at all times that any patron is present in the adult arcade and to ensure that no patron is permitted access to any area of the adult arcade which has been designated as an area in which patrons will not be permitted in the plan filed pursuant to section 28-92(c) of this Code.

Sec. 28-102. *Lighting.*

(a) Each adult arcade shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) foot candle as measured at the floor level.

(b) It shall be the duty of the owners and operator and it shall also be the duty of any agents and

> employees present in an adult arcade to ensure that the illumination (a), above, is maintained at all times that any patron is present in the adult arcade.

The definitions contained in the Ordinance are sufficiently precise and detailed to give fair notice of the conduct proscribed. *Martinez v. State,* 744 S.W.2d 224, 226-27 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*); *accord, Gordon v. State,* 757 S.W.2d 496, 498-99 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*). Petitioner's strained reading of the language of the ordinance attempts to create ambiguities where none exist. The Texas Courts have found no confusion in the penal provisions of the Ordinance regarding which persons are subject to the permit requirement, and have distinguished Petitioner's cited authority, *Sheppard v. Giebel,* 110 S.W.2d 166 (Tex. Civ. App.—Austin 1937, no writ) (cited at p. 6 of the Petition) as follows:

> Clearly, the unlawful activity is owning, operating, managing, or conducting *the business* without a permit, and not owning the building. The party liable is the owner, operator, or manager of the business who has no permit. Unlike *Sheppard,* there is no uncertainty as to who must obtain the permit and bear the penalty of not doing so. (Emphasis in original). *Gordon v. State,* 757 S.W.2d 496, 498 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*).

Petitioner's objections to other terms in the Ordinance simply ignore the plain and unambiguous meaning of the words used. "Dispense," for example, means more than "deal out in portions," although even that meaning is not inaccurate in describing the way video machines operate. "Dispense" also means "to distribute" and "to give," which

in turn can mean "to furnish or serve." Webster's New International Dictionary, Unabridged, 2nd Ed. Under the ordinary meaning of any of these definitions, it is quite clear what "dispensing entertainment" means. *Gordon v. State, supra,* 757 S.W.2d at 498.

Petitioner also attacks the definition of "arcade device" in Section 28-81 of the Ordinance:

> *Arcade device* shall mean any coin or slug operated or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of entertainment, *that is intended for the viewing of five or fewer persons in exchange for any payment of any consideration.* (emphasis added).

The placing of the comma after the word "entertainment" in the above definition makes it clear that the phrase "intended for the viewing of five or fewer persons . . ." refers grammatically to "machine or device," not "entertainment." The argument that a film or tape itself may be intended, over a period of time, to be viewed by large numbers of people is therefore irrelevant, since the definition in question refers to the number of persons that can view the device. *Gordon v. State, supra,* 757 S.W.2d at 498-499.

The phrase "unobstructed view" is equally unambiguous and, when considered in the light of the detailed standards contained in the Ordinance for the issuance of permits, would not encourage arbitrary or discriminatory enforcement. *See, Martinez v. State, supra,* 744 S.W.2d 224 at 227 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*).

Mathematical precision of terms is not required. *Grayned v. City of Rockford, supra,* 408 U.S. 104 at

110; *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir. 1980). The Ordinance clearly specifies both the type of activity regulated and the requirement of a permit in terms that are understandable by persons of ordinary intelligence and which do not encourage arbitrary enforcement.

B. The Ordinance is not overbroad.

An ordinance is overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. City of Rockford,* 408 U.S. 104, 114 (1972). However, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984). Petitioner suggests that the requirement of Section 28-101(a) that all areas of adult arcades be within the unobstructed view of a manager's station would impede or interfere with the sale of books or magazines in any adjoining bookstore on the same premises.

This argument ignores the fact that the Ordinance is a content-neutral regulation that is aimed at serious secondary effects attributable to the configuration of adult arcades. Therefore, any incidental restrictions on arranging inventory should be analyzed under the standards appropriate to time, place or manner regulations. *Rahmani v. State,* 748 S.W.2d 618, 622 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*), *citing, City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986). The Ordinance requires an unobstrued view of the premises from a manager's station because the legislative findings justifying the Ordinance demonstrated a sub-

stantial danger to the public health and safety from enclosed booths and poor lighting in adult arcades.

Petitioner's hypothetical argument fails to take into account that any printed material could be displayed on low shelving or wall racks or other configurations sufficient to leave every area in view of a manager's station. Moreover, under the Ordinance, an arcade can be operated as a separately leased premise with separate means of ingress and egress, thus avoiding any effect at all on a bookstore operation in the same building.

As noted by a Texas court addressing the identical arguments raised by Petitioner before this Court, "[t]he only actual effect of this Ordinance is that patrons of adult arcades will be required to peruse openly, under specified minimum lighting, the entertainment provided." *Rahmani v. State, supra,* 748 S.W.2d at 622.

Petitioner raises another overbreadth argument with regard to Section 28-91(a) of the Ordinance, which makes it unlawful for any person to "own, operate, manage or *conduct any business* in an adult arcade unless there is a permit for the adult arcade." (emphasis added). Petitioner interprets this to mean that any customer making a purchase or any two persons simply discussing an unrelated business transaction would be subject to criminal penalties under the Ordinance, for "conducting any business," and cites this as facially overbroad. However, Petitioner may not, in a facial overbreadth attack, assert the rights of others whose freedom of expression might arguably be deterred by a vague statute, if the statute is "readily subject to a narrowing construction by state courts." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 60 (1976). The Texas Courts of Appeals that

have considered Petitioner's argument have found that this provision of the Ordinance is not susceptible to the broad construction urged by Petitioner, and have, in fact, narrowed the challenged provision so as to preclude its application to mere customers or persons who might conduct business transactions on the arcade premises that are unrelated to the operation of the arcade. *Martinez v. State, supra,* 744 S.W.2d 224, at 228 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*); *Gordon v. State, supra,* 757 S.W.2d 496, 500 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*); *see also, Tisdale v. State,* 640 S.W. 2d 409, 415 (Tex. App.—San Antonio 1982, *pet. ref'd*).

C. The Ordinance is content-neutral and, therefore, does not violate due process of law and does not constitute a prior restraint on freedom of expression.

Contrary to Petitioner's assertions, the preamble to the Ordinance establishes that the Ordinance is content neutral, because its *predominant* concerns are with certain adverse secondary effects directly and specifically attributable to *adult* arcades. The preamble to the Ordinance is set out, in part, in *Lopez v. State, supra,* 756 S.W.2d 49, at 51 (Tex. App.—Houston [1st Dist.] 1988, *pet ref'd*) and reads as follows:

> WHEREAS, the City Council further finds, that substantial numbers of arrests for sexually related crimes have been made in adult arcade establishments; and
>
> WHEREAS, the City Council further finds that numerous persons treated for sexually transmitted diseases have reported an epidemiology including sexual encounters in adult arcades; and

> WHEREAS, the City Council further finds that adult arcades that are configured with booths represent a greater danger to the patrons and the employees of the establishments in the event of a fire; and
>
> WHEREAS, the City Council finds that the public health, safety and welfare require that adult arcades be configured in such a nammer (sic) that all patrons will be subject to direct observation by the employees thereof and that certain minimal lighting requirements should be imposed in order to discourage the use of adult arcades as places for sexual encounters and to improve egress in the event of a fire; and . . .
>
> WHEREAS, the City Council further finds that licensing of adult arcades should be required to ensure that the establishments are in compliance with the configuration and lighting requirements and to provide a means of accountability to ensure that operators do not knowingly allow their establishments to be used as places of sexual encounter or solicitation . . .

The Ordinance is content-neutral, even though it regulates only "adult" businesses, because it is "*justified* without reference to the content" of the films in adult arcades. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 929 (1986). Moreover, like the zoning ordinance in *Renton*, which regulated only adult theatres, the Houston Ordinance is "narrowly tailored" to affect only the particular category of businesses that the City Council found were conducive to the sexual conduct which the Ordinance addresses, i.e. "adult" arcades.

It is hardly grounds for constitutional attack that an ordinance narrowly regulating businesses exhibiting entertainment of a sexual nature, the premises of which have been found to be the location of casual sexual encounters, does not also address establishments exhibiting "Heidi" or other children's fare. Under the rationale of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Ordinance does not offend the first amendment or due process by regulating adult-oriented establishments differently from other kinds of entertainment establishments. *See, Broadway Books, Inc. v. Roberts, supra,* 642 F. Supp. 486, 490 (E.D. Tenn. 1986).

Finally, Petitioner's citations of *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); and *Iranian Muslim Organization v. City of San Antonio,* 615 S.W.2d 202 (Tex. 1981) are inapposite. *See, Gordon v. State, supra,* 757 S.W.2d 496, 501 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*). These cases, without exception, involved complete bans or wide-ranging prohibitions on protected speech based on the content of that speech. By contrast, the Ordinance is a relatively modest regulation that restricts *only* the manner in which adult arcades are arranged and lighted. The Ordinance does not presume to censor films based on their content. It does not, "ban adult arcades, adult literature or adult entertainment. It merely regulates the *manner* in which an adult arcade may operate." *Gordon v. State, supra,* 757 S.W.2d 496, 501 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*) (emphasis supplied). To characterize the Ordinance as a ban or prior restraint type of censorship of protected speech misconstrues the limited nature of the regulations imposed under the Ordinance.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Texas Court of Appeals correctly affirmed the Petitioner's conviction under the Ordinance, based on the reasoning of prior published opinions of the Texas courts addressing the identical issues raised in this Petition. The Texas courts have properly upheld the Ordinance against Petitioner's claims of vagueness, overbreadth, due process and prior restraint violations. The Petition should also be denied because there is no conflict among the Circuits, or, indeed, among any of the various state and federal courts, which have uniformly upheld similar regulations on enclosed viewing booth establishments as valid time, place or manner restrictions.

Respectfully submitted,

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